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April 5, 2002

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

REDACTED – FOR PUBLIC INSPECTION

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*
CC Docket No. 01-338 et al.

Dear Mr. Caton:

Enclosed for filing please find the Comments of AT&T Corp. ("AT&T") in connection with the above referenced matter. Pursuant to the Notice of Proposed Rulemaking issued December 20, 2001, AT&T is submitting one (1) copy of its comments and supporting exhibits in redacted form via ECFS.

AT&T is also submitting under seal the portions of supporting exhibits that contain material designated as confidential pursuant to the Protective Order in this matter. These pages bear a legend indicating that they are confidential.

Please let me know if any additional information is required. Thank you.

Very truly yours,

Peter M. Andros
Legal Assistant

Encl.

REDACTED – FOR PUBLIC INSPECTION
CC Docket Nos. 01-338, 96-98, 98-147

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

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April 5, 2002

EXECUTIVE SUMMARY

In New York, the promise of the 1996 Act is beginning to be fulfilled. Millions of residential and business customers have switched their local service to competitive carriers. These customers are starting to enjoy the benefits of price competition and product diversity that only competition can bring. New York stands out, in part, because its commission is the first to make unbundled network elements available to competitors both at reasonable prices and through workable operations support systems. But New York is a leader in another key respect as well: it is *also* among the states with the highest levels of facilities-investment, not just by AT&T but by incumbents as well. Market experience in New York demonstrates conclusively that making unbundled network elements ("UNEs") available to competitors does *not* discourage facilities-based competition, as the incumbent local companies would have the Commission believe. In fact, access to UNEs is essential to promote facilities-based competition.

In most other states, however, consumers and most businesses still have no choice but to accept local phone service from the incumbent monopoly carrier. Dozens of would-be competitors that borrowed heavily to buy and deploy switches and fiber are now bankrupt. Remaining competitors are struggling to survive. Their switches and other local facilities are underutilized or idle, and they still lack the practical ability to use the incumbent's network elements, either because UNE rates are too high, because operational support from the incumbent is inadequate, or both. Absent changes in these conditions, the prospects for further facilities-investment in local service for these states are dim, to say the least.

This Commission, then, is at a crossroads. Will the Commission propel the rest of the country toward the local competition and facilities-investment that New York has shown will result from vigorous enforcement of the 1996 Act? Or will it perpetuate the capture of

consumers by stagnant local monopolies for the foreseeable future, by relaxing its UNE rules in hopes that some new technology to provide local service might emerge in the future?

The Commission will make that pivotal choice here. The core question posed in this NPRM is whether the availability of unbundled network elements helps or hinders the development of local facilities-based competition. The market experience of the last 6 years, and indeed the last 30 years, answers that question loud and clear: unfettered access to UNEs is crucial to promote both local competition and the investment in facilities necessary to provide both traditional and advanced local services. That was clearly the model that led, over three decades, to today's highly competitive long distance market. And it is the model that, if fully and zealously enforced now, will create competitive local service markets as well.

The marketplace evidence unequivocally refutes the ILECs' monopoly-serving claims. The ILECs argue that UNEs are a needless "crutch," and that their availability deters both CLECs and ILECs from investing in new facilities. "Restrict access to UNEs," the ILECs confidently assert, "and competitors will then build their own facilities to compete with us. But fail to restrict UNEs," they add, "and no one, including us, will invest in new facilities." The ILECs would thus have the Commission believe that restricting CLEC access to UNEs is just a form of economic "tough love" that will transform the CLECs into stronger competitors.

Fortunately for consumers, the absurdity of the ILECs' self-serving prescription is now starkly apparent. It is counterintuitive to suppose that the ILECs genuinely wish to make it easier for their competitors to lure away long-captive local customers. It is far more reasonable (and consistent with their past behavior) to suppose that the ILECs would prefer to handcuff their competitors' efforts to compete. After all, that is what would serve the ILECs' economic interest, and what has motivated their ceaseless efforts to obstruct enforcement of the UNE-

related provisions of the Act from the day it was adopted. The ILECs have already paid scores of millions in fines for failing to meet their market-opening obligations under the Act. These fines, and not the ILECs' press releases, most accurately gauge the ILECs' commitment to local competition.

Recent market experience refutes the ILECs' rhetoric and proves that accepting the ILECs' recommendations would ensure the Act's failure. The Commission can now compare a local market, such as New York, where the Act's unbundling rules are being effectively enforced and facilities investment is high, with those in which enforcement has lagged. The data show that the availability of UNEs does not discourage either CLECs or ILECs from investing in facilities. AT&T's own market experience further confirms what Congress and this Commission previously thought would be true: the availability of UNEs promotes – and is a necessary precondition for – investment in facilities-based competition. Experience thus shows that the ILECs' approach will lead not to facilities-based local competition, but to no local competition.

The attached comments and supporting declarations set forth in detail the marketplace evidence that the Commission has said should guide its critical decision here. The Commission should focus first on the strong evidence that access to UNEs, including the UNE Platform (or UNE-P), is beneficial in itself. AT&T describes the substantial competitive benefits that enforcement of the Commission's existing UNE rules has already produced in some places and that no other form of local competition, including cable telephony, can match. CLECs already serve almost as many residential customers through UNE-P in New York alone as all cable telephony providers serve nationwide. And in the face of Verizon's recently announced plans to raise local service rates in New York, New York consumers now have meaningful alternatives, such as AT&T's offer of a service package that provides local service with no price increases for

the next year. Such price competition, along with the new product and feature packages that AT&T and other CLECs have introduced in New York, prove that UNE-P allows competitors to provide consumers valuable competitive benefits that this Commission should widely promote. Thus, quite apart from its effect on investment, UNE-based competition is beneficial in itself, and should be preserved and expanded for that reason alone, as NARUC has requested.

But that is not all, for the dispositive marketplace evidence is that access to UNEs promotes – and does not deter – increased facilities investment by CLECs and ILECs alike. AT&T's experience, in particular, confirms the Commission's prior findings that CLECs will deploy their own facilities as soon as it is economically and technically feasible to do so. The availability of UNEs at true TELRIC prices does not delay the deployment of facilities, because transaction costs and other competitive disadvantages of using UNEs mean that CLECs' real costs are far higher than the TELRIC rate. UNEs instead play a critical role in permitting CLECs to develop the customer base, traffic, and revenues needed to support facilities-investment.

AT&T has invested billions of dollars since 1996 to deploy more than 115 local switches in over 60 markets around the country, to re-engineer more than 200 long distance switches to provide local service, to establish over 1,000 collocations in ILEC switching offices, and to install more than 17,000 route miles of local fiber connecting customers in about 6,000 buildings to its network. This extraordinary investment in network facilities alone belies any claim that AT&T lacks commitment to facilities-based competition. But the record also shows that AT&T's lack of access to UNEs – due to high prices and other restrictions – seriously impedes further facilities investment today. No company, including AT&T, can justify large investments in facilities when existing facilities are severely underutilized. Yet that is precisely the predicament AT&T and other facilities-based carriers now face. Regulatory restrictions that the

Commission has placed on certain UNEs, together with high UNE prices and operational obstacles that CLECs face in gaining access to unbundled loops and other UNEs, prevent AT&T and other CLECs from obtaining the local traffic they need to fill existing facilities and support further investment.

Eliminating these restrictions and obstacles to the use of UNEs would directly promote greater investment in alternative facilities. AT&T's efforts to serve customers in low-volume business locations is a case in point. AT&T initially attempted to serve these customers using its own switches, which, in turn, required the ILECs to provision each new customer with a "hot cut" at the time of transfer from the ILEC to AT&T. This effort foundered, and ultimately was terminated, because hot cuts could not be provisioned in a timely, efficient, economic, and accurate manner. AT&T now uses UNE-P to transfer customers to AT&T, and later arranges a managed "project" cutover to its own switching when it is economic and technically feasible to do so. This approach has clearly advanced competition and customer choice. The availability of UNE-P has enabled AT&T to win and keep far more low-volume business customers than was possible before, and creates the opportunity to serve them with AT&T's own switches.

The availability of UNEs will also promote facilities-based service for residential customers. To serve residential customers, AT&T has invested billions of dollars in alternative facilities (fixed wireless, cable, and now packet-switching) to avoid complete dependence on ILEC facilities. Yet fixed wireless has proven unsuccessful for both AT&T and other now-bankrupt carriers who pursued it, and cable telephony, while promising, has been pursued only in selected locales, and only as cable networks are gradually (and expensively) upgraded for that purpose. The continued availability of UNE-P is thus critical to AT&T's ability promptly to enter the residential market and build a customer base that could support switch-based provision

of voice service in the future. For example, AT&T is now offering residential customers in New York a combined package of voice and DSL-based services using UNE-P and AT&T's own packet switching and associated network facilities. This service will ultimately allow AT&T to offer customers second and third "derived" voice lines through the packet-switched network at highly competitive prices. If AT&T can offer this service bundle successfully, it may also be able to justify serving customers in the same areas with switch-based voice-only service.

AT&T's market experience thus demonstrates that the availability of UNEs is essential to its ability to use its own facilities to provide local service. Indeed, the data confirm that facilities-investment is highest where UNEs are most available. For example, in New York the state commission long ago made clear its determination to foster UNE-based competition, and residential UNE-P competition has existed in New York since 1999; in California, by contrast, residential UNE-competition has been unavailable because of preclusively high UNE rates and inadequate operational support. Although New York is smaller than California, AT&T has deployed more switches (both in absolute terms, and on a per-line basis), extended fiber to more buildings, and is serving far more customers using its own switches, in New York than in California. The ILECs, for their part, understand that the threat of competition is far greater in states where UNE-P is available. As a result, the rate of *ILEC* investment in facilities also is *higher* in the states with the highest levels of UNE-P entry – New York, Texas, and Georgia – than it is in comparable states where UNE-P competition has not yet been made practical, such as California, Massachusetts, and New Jersey.

The availability of UNEs is also essential to promote both CLEC and ILEC investment in broadband. Some ILECs have claimed that they will withhold further broadband investment unless they are relieved of the duty to provide competitors with unbundled access to the loop

facilities that support broadband service. The Commission should see this threat for what it is: a calculated and cynical ploy designed to wall-off the very competition that is essential to spur investment in the equipment needed to provide DSL-based services. Indeed, the ILECs' voice monopolies provide a powerful *dis*incentive to broadband-related investments, for DSL-based services cannibalize the high-margin second-line services that the ILECs uniquely offer. Thus, as the Commission has recognized, the ILECs did not deploy the long-available technology to support DSL-based service until competition from cable providers and CLEC competitors made erosion of their second-line revenues inevitable. AT&T remains committed to facilities-based broadband competition, and has already acquired and deployed a substantial packet-switched network to provide that competition. But because AT&T and other competitors can neither replicate the last-mile loops that the ILECs control nor upgrade existing loop facilities to facilitate broadband service, unbundled access to those loops remains critical to promote competition and innovation from ILECs and CLECs alike.

In sum, the market experience of the last six years demonstrates that the fundamental tenets of the Act are sound. The Commission should build on the success achieved in New York and that is imminent in other states, and accelerate the progress toward competition in the future, by taking three critical steps to promote local competition and facilities-investment:

(1) *Retain the Existing National List Of UNEs*: CLECs remain seriously impaired in their ability to offer local services without the UNEs on the existing national list. Access to unbundled loops remains critical in all but the rarest of circumstances, in which: a customer's need for very high capacity loops allows the CLEC to obtain economies of scale; local obstacles involving rights of way and building access can be successfully overcome; customers are willing to wait for the CLEC to construct such facilities; and the ILEC does not undercut the CLEC's

efforts by simply adding new capacity through the use of additional loop electronics. Access to unbundled transport also remains vital, since alternatives to ILEC transport facilities are available on only a small fraction of routes that have the greatest concentration of traffic, and where necessary rights of way and collocation arrangements can be made efficiently. Access to unbundled switching, too, is equally crucial, because obstacles to connecting a CLEC's own switch to an ILECs' unbundled loop (such as hot cuts and the increasing use of hard-wired DLC loops) are inherent in the ILECs' current network architecture.

In short, the circumstances that underlay the decisions in the Commission's *UNE Remand Order* have not changed, except for the deteriorating market conditions that now severely restrict CLECs' access to construction capital. Moreover, it is now clear that any changes to these circumstances in the future will occur only on a highly localized basis. Thus, the Commission should retain the existing national list of UNEs in order to give CLECs and capital markets the certainty they need to enable CLECs to execute their business plans, build their customer base, and generate revenues to support further facilities-investment. The Commission also should indicate that the future withdrawal of any particular UNE from the minimum national list will occur only with the concurrence of the state commission in the state where the "de-listing" would occur, and only upon proof that alternatives to that UNE are currently available in sufficient quantities to meet the needs of multiple CLECs in the affected area.

(2) *Remove The Three Key Regulatory Restrictions On UNEs*: Actual market experience also demonstrates that the Commission's earlier efforts to place "granular" restrictions on the availability of UNEs have only impeded facilities-based competition. Access to UNEs is essential to provide CLECs with the traffic and revenue they need to fill existing facilities and justify further facilities-investment. Restrictions that make it harder for CLECs to

serve customers only block further investment. This is true of each of the three major restrictions on the use of UNEs.

First, the Commission's use-restrictions and co-mingling restrictions on existing loop-transport combinations ("EELs") mean that CLECs incur far higher costs than ILECs do to use the transmission facilities that connect the CLEC's customers to CLEC switches. These high costs substantially impair the CLECs' ability to use their own switching facilities to serve customers and contribute to the underutilization of existing CLEC switches. There is no legal justification for these restrictions. There is also overwhelming evidence from market experience that their continued application undermines the Commission's policy to promote facilities-based competition. The Commission should thus act swiftly to remove the restrictions on use of EELs.

Second, the Commission's three-line carve-out from unbundled switching is equally counterproductive. In practice, this arbitrarily constructed restriction serves only to insulate large numbers of low-volume business locations from facilities-based competition, since the evidence clearly demonstrates that CLECs cannot use unbundled switching to win those customers. That restriction has now been removed in New York, and this Commission should quickly eliminate this continuing obstacle to competition nationwide.

Third, the Commission's rules restrict CLECs from gaining access to so-called "next generation loop carrier" ("NGDLC") loops in central offices. This wholly unnecessary restriction prevents AT&T and other CLECs from offering DSL-based data and voice services using their own packet-switched networks, inhibits competition for both voice and data services, and undermines facilities-based competition for DSL-based services.

(3) *Promote Electronic Loop Provisioning*: In addition to enforcing current UNE rules and eliminating counterproductive restrictions, the Commission can accelerate the

development of competition through parallel networks by adopting measures to stimulate deployment of electronic loop provisioning ("ELP"). ELP is analogous to the electronic "equal access" process that was decisive in the development of facilities-based long distance competition. The technology to support ELP is readily available today. Its deployment will eliminate the enormous obstacles to facilities-based competition that manual cutovers and DLC loops will otherwise continue to present.

* * *

The stakes in this proceeding could not be higher. The record of the last six years vividly illustrates the inherent fragility of local competition. This proceeding may well be the Commission's last chance to calm capital markets and create the regulatory conditions that will allow AT&T and other competitors to provide business and residential consumers throughout the country with effective UNE-based competition that can expand, over time, to include facilities-based competition. Such a path is eminently feasible. Indeed, it is the very path that opened up the long distance market to the vibrant facilities-based competition that sprouted and flourished from its non-facilities-based "roots" over the past three decades. It is folly for the ILECs to claim (or the Commission to believe) that the path to facilities-based local competition set out in the 1996 Act could be completed in a radically shorter timeframe or on a different basis, especially in the face of the ILECs' enormous advantages that no competitor can match.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF AT&T CORP.

Pursuant to the Commission's *Notice*, AT&T Corp. ("AT&T") respectfully submits its comments in this proceeding concerning the availability of unbundled network elements under §§ 251(c)(3) and 251(d)(2) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 251(c)(3), 251(d)(2).

INTRODUCTION

The Commission is here comprehensively reviewing the "unbundling" rules that define the conditions under which competitive local exchange carriers ("CLECs") can obtain network elements from incumbent local exchange carriers ("ILECs") at cost-based rates and use them to offer local and other services. *See* 47 C.F.R. §§ 51.317-319. The *Notice* seeks comments on the fundamental question whether these rules remain "current and faithful to the procompetitive, market-opening provisions" of the 1996 amendments to the Act "in light of our experience over

the last two years, advances in technology and other developments in the markets." *Notice* ¶ 1; *see, e.g., id.* ¶¶ 2, 4, 17, 25.

As AT&T explains in detail below, the Commission's rules are fulfilling the Act's objectives where they authorize CLECs to obtain loops, transport, switching, and other associated facilities, both individually and in combinations such as the UNE-Platform ("UNE-P"). These rules have enabled AT&T and other CLECs to offer residential consumers immediate benefits through competition that otherwise would not exist in the (unfortunately few) states where TELRIC rates are not excessive and OSS are performing reasonably well. They have also enabled AT&T and other CLECs to offer and to transition to facilities-based service in some circumstances.

But there are a number of fundamental ways in which the current rules impede effective competition. Restrictions that the Commission's rules place on certain UNEs – and the absence of electronic provisioning methods that were a key to the development of long distance competition – have severely impaired the development of the broader facilities-based competition that will produce the greatest benefits for consumers in the long run. The consequence has been to prevent AT&T and other CLECs from fully utilizing the extensive switching and other facilities that they have deployed and to deprive them of the traffic and revenues that they need to support their existing facilities and to invest in additional facilities.

In this regard, the *Notice* specifically asks whether its rules are promoting facilities-based competition not only by "full facilities carriers" but also by carriers who combine their own switches and other facilities with loops, transport, and other unbundled network elements obtained from ILECs. *Notice* ¶ 3. The Commission's emphasis on competition that can be offered through self-provisioned switches and unbundled loops is proper, for this is the form of

facilities-based competition that is both the most feasible and most meaningful. The efficient competitive provision of "last mile" and other local transmission facilities is almost universally precluded by the enormous economies of scale that characterize these facilities and by the ILECs' entrenched monopoly position and first mover advantages. And even where such facilities are deployed, they offer no significant potential for service differentiation. *Id.* ¶ 29. By contrast, as the Commission has found, multiple CLECs can achieve unit switching costs that are close to those of the incumbent when they acquire relatively small fractions of the customers located in areas served by a number of ILEC switches *and* when they can efficiently and economically use local transmission facilities to hook up these customers to centrally located switches. *UNE Remand Order* ¶ 261. When multiple CLECs can effectively provide service through self-provisioned switches, customers have a choice of multiple competing switch-based "platforms" that can offer differentiated services and provide great consumer benefits.

But this facilities-based competition is simply not being achieved. The reason is not the facile one the ILECs have advanced in their relentless public relations campaigns against the Act's unbundling obligations – *i.e.*, that the availability of the UNE-P at TELRIC-based rates deters CLECs from making efficient facilities investments that would otherwise be made. As the Commission found in its *UNE Remand Order* and as actual market experience vividly confirms, CLECs invest in alternative facilities whenever and wherever it appears economically and technically feasible to use them to provide service profitably, and the availability of UNEs is an "essential precondition" to such investment. In fact, actual market experience quite conclusively shows that rather than withholding economic investments by relying on UNEs, CLECs made far *greater* facilities investments than were warranted under the market conditions that in fact have prevailed. Moreover, when effective UNE-P competition has been available, it has not only

itself provided immediate benefits for consumers, but also had lead to greater overall investment in the telecommunications infrastructure by CLECs and ILECs alike.

Thus, the reason that switch-based local service has not broadly developed is that there are fundamental marketplace impediments – derived both from the ILECs' networks and practices and from restrictions in the Commission's current rules – that now prevent CLECs from economically serving customers through self-provisioned switches in all but the most unusual circumstances.

The first constraint is a product of the current characteristics of the ILECs' network and of their incentives. All voice-grade loops are now "hardwired" to an ILEC switch, and loops provided over Digital Loop Carrier ("DLC") systems – which represent a large (25%) and rapidly growing percentage of all loops – are bound even more tightly to the ILECs' network for technical reasons that the Commission has long recognized. *See, e.g., Local Competition Order* ¶¶ 383-84. The ILEC networks do not now contain fast, cheap, and reliable methods to break these "bonds" and to connect loops to CLEC facilities electronically – and ILECs have had no incentive to establish these arrangements and powerful incentives not to do so. Rather, the ILECs instead employ "coordinated hot cuts" to make such changes, a manual process in which they must physically disconnect and reconnect a customer's individual loops at the time that it changes carriers. Even before there was substantial actual experience with hot cuts and the level of the associated nonrecurring charges, the Commission found that use of hot cuts would itself "impair" a CLEC that used its own switches in serving all but the largest business customer locations that make the most intensive use of telecommunications services. *UNE Remand Order* ¶¶ 266, 271. The CLECs' actual experience confirms that finding. Hot cuts have proven to be so costly, inefficient, capacity-constrained, and unreliable that AT&T was forced to abandon its

initial market entry strategy of serving all business customers exclusively through "UNE-L" arrangements – *i.e.*, arrangements in which AT&T combines an unbundled ILEC loop with its own switching and other facilities. Instead, AT&T – at great expense – has implemented new arrangements in which business customers with voice-grade loops are initially served through UNE-P and later are transferred in large groups to AT&T's switch on a "project" basis. That method itself is suboptimal and too expensive to use to serve lower volume locations generally, but it can allow AT&T to obtain higher volume customers and to move them to its existing switches. Brenner Dec. ¶¶ 43-54.

In addition, the Commission's current rules impose additional further impediments to moving certain customers' loops to self-provisioned switches. At the behest of the ILECs, the *UNE Remand Order* and subsequent orders imposed three restrictions on access to UNEs. Each itself has the effect of making it uneconomic for CLECs to serve customers through self-provisioned voice or data switches. These restrictions have also enabled ILECs to use claimed ambiguities in the restrictions to engage in case-by-case litigation that has raised CLECs' costs of using UNEs to which they are entitled.

First, relying upon the Eighth Circuit's decision, ILECs have refused to permit CLECs to order new combinations of loops and high capacity transport facilities to efficiently and economically connect customers to their switches, and the Commission's rules impose use and co-mingling restrictions on existing loop-transport combinations ("EELs"). These force CLECs to incur substantially greater costs than the ILEC for use of the transmission facilities that connect a CLEC's customers to its switches – because the CLEC must either collocate in every ILEC end office or rely on ILECs' special access services that are not remotely provided at cost-based rates. Even if there were a fast, cheap, and reliable electronic means to provision loops,

these restrictions would still make it wholly uneconomic for AT&T to serve many lower volume customers through its switches, because they materially raise the costs of service for these and other customers. They also prevent AT&T from putting greater pricing pressure on the ILECs.

Second, the Commission's 3-line "carve out" from unbundled switching means that AT&T cannot place certain customers with voice-grade loops on UNE-P and then move them to AT&T's switches on a project basis – which, because of the problems with hot cuts, is now the only feasible way to serve customers with voice-grade loops. The carve out's EELs requirement still leaves CLECs at the mercy of the hot cut process. The carve out has thus foreclosed any form of competition for these customers.

Third, the Commission's rules prevent CLECs from accessing so called "next generation digital loop carrier" ("NGDLC") loops in central offices and require that CLECs establish collocations in every remote terminal – which is far more expensive and wholly uneconomic. This adversely affects the provision of facilities-based service to residential as well as business customers. For example, there are several states in which AT&T has been able to offer broad-based UNE-P competition and to create substantial benefits for residential customers in these states. But AT&T has been prevented from using packet switching and associated facilities that would eventually allow residential customers to receive second or third voice lines as well as DSL-based services over their existing loops. That has limited the residential services that AT&T can offer in states it has entered and impaired its ability to enter additional states.

These factors have significantly contributed to the widespread business difficulties of CLECs who have deployed voice and data switches and whose businesses are inherently fragile. Willig Dec. ¶¶ 13, 84, 91-97. Indeed, during the last three years, literally scores of such facilities-based CLECs have declared bankruptcy, and the local businesses of AT&T and other

remaining CLECs have experienced severe financial difficulties, for the switching and other facilities that they have deployed have been chronically underutilized and have been denied revenues sufficient to support them. *Id.* ¶ 95. This is a business climate in which the prospects for further facility investment is bleak.

In this proceeding, the Commission thus finds itself at a vital crossroads. The Commission now has what may prove to be its last opportunity to calm capital and other markets and to create the regulatory conditions that will allow the development of the facilities-based and other forms of local competition that continue to be eminently feasible and that AT&T and other CLECs want to pursue. The Commission is also presented here with two radically different proposed paths and proposals: those of AT&T and other CLECs and those of the ILECs.

AT&T's Proposal. AT&T's proposal is based on the actual marketplace experience of a firm that has made intensive and extensive attempts to provide local service to all classes of customers through every facilities and non-facilities-based method that has ever been seriously identified as realistic: from resale, to UNE-P, to UNE-L, to fixed wireless, to cable television systems, to fiber rings. This experience is described in detail in the accompanying declarations of the AT&T officials who are responsible for residential local service (Huels Declaration), for local service to business customers (Brenner Declaration), and for the management of AT&T's alternative switches, collocations, and other facilities (Lesher-Frontera Declaration). Its proposal also reflects the views of economists who exhaustively analyze the actual market experience and the data under economic principles. *See generally* Willig Dec.; Clarke Dec.

AT&T urges the Commission to do three things in this proceeding.

First, the Commission should maintain its existing national list of UNEs and UNE-P, as NARUC has urged. *See generally* NARUC UNE-P Resolution (adopted Nov. 14, 2001)

(attached to letter from Joan Smith *et al.* to Chairman Powell and Commissioners Abernathy, Copps, and Martin, CC Docket No. 96-98 (December 5, 2001)). There has been no material change in the conditions that led the Commission to find in the *UNE Remand Order* that CLECs will be impaired in providing local service if they are denied access to the loop, transport, unbundled switching and signaling, and operations support systems elements and that the availability of these UNEs promotes the Act's other objectives. Indeed, intervening events have vividly demonstrated that UNE-P provides immediate benefits to consumers – *e.g.*, AT&T's UNE-P-based residential service in New York is guaranteeing many customers lower and stable rates in the face of Verizon's recent price increases – and consumers in New York and other states will be seriously harmed if UNE-P based service is not available. Similarly, intervening events have also confirmed that UNE-P is playing its predicted role and acting as an "essential precondition" to deployment and use of alternative facilities: *e.g.*, when customers are placed on UNE-P to avoid costly and inefficient hot cuts and subsequently moved to an AT&T switch.

Because the conditions that can eliminate impairment are inherently local, AT&T also urges that the Commission provide that an individual UNE can be removed from the list in the future only with the concurrence of the state commission in the state where the de-listing would occur, and only where specified conditions are met that establish that alternatives to a UNE are currently available in sufficient quantities to meet the needs of multiple CLECs. *See* NARUC Resolution Concerning the States' Ability to Add to the National Minimum List of Unbundled Elements (adopted Feb. 13, 2002).

Second, the Commission should remove the restrictions that are demonstrably impairing facilities-based entry and denying competitive alternatives to certain customers. Specifically, it should (1) eliminate the use and co-mingling restriction on EELs; (2) eliminate the 3-line carve

out for unbundled switching in the densest zones of the largest 50 MSAs or, at a minimum, limit it to DS1 and higher capacity lines that do not require hot cuts; and (3) correct the definitional and other errors that have prohibited CLECs from accessing the high frequency portion of NGDLC loops in the ILECs' central offices.

Third, the Commission should adopt measures that give ILECs incentives to adopt "electronic loop provisioning" that will eliminate both the need for costly, inefficient, and unreliable "hot cuts" on all voice grade loops and the severe additional operational problems that make it extremely difficult, if not impossible, to access DLC loops. Electronic loop provisioning is analogous to the electronic "equal access" that was a decisive step in the development of long distance competition.

The ILECs' Proposals. The Notice also seeks comments on the very different allegations and proposals that the ILECs have advanced in *ex parte* and other filings over the past two years – all of which are part of the broader public relations campaign that the ILECs have directed at the Commission, Congress, and other decisionmakers. The ILECs speak, of course, as the incumbent monopolists. As the Commission has found in the past, the ILECs have enormous incentives to prevent arrangements that will lead to effective competition with their networks. *Local Competition Order* ¶ 10. As the Commission has also found in the past, they are firms who have powerful incentives to withhold investments in new technologies that will limit the value of their existing monopoly assets, who delayed rolling out DSL- and ISDN-based service for a decade because it would impair their second telephone line services, and who introduced DSL-based service only in response to cable modem services and the DSL-based offerings of data CLECs. Willig Dec. ¶¶ 173-79. The ILECs are also firms who have been fined tens of millions of dollars for violating performance measures that are designed to allow local

competition to develop. Finally, the ILECs are firms who in the past successfully advocated restrictions on UNEs and who thereafter exploited them – in ways the Commission had not foreseen – to destroy the fragile economics of CLECs' facilities-based operations.

But the ILECs now claim they are interested not in protecting their monopolies, but rather in assuring that consumers can genuinely obtain service from multiple competing intermodal and other "platforms" and, above all else, in promoting the broad availability of the broadband services that has become a major priority of this Commission.

The ILECs' fundamental claim is that the broad availability of UNEs has prevented the development of competition and otherwise harmed consumers. They assert that UNE-P competition produces no or few short-term benefits, and they assert that its availability at the ILECs' economic costs has caused CLECs to suppresses investments that they otherwise would have made in alternative loop, transport, and switching facilities which, the ILECs also assert, could be readily deployed. They further claim that the duty to provide UNEs at TELRIC-based rates has prevented or inhibited ILECs from investing in their own networks – particularly broadband services. For these reasons, they maintain that the Commission should impose artificial restrictions on UNEs to promote other policies.

Specifically, the ILECs propose that the Commission eliminate the unbundling obligations for high capacity loops, transport, and switching. Alternatively, the ILECs claim that the Commission should adopt more "granular" and "targeted" rules under which these elements would not be available in cases where the Commission can – the ILECs claim – deduce from other data that CLECs are able to obtain the facilities from sources outside the ILECs' networks and economically provide service. In addition, the ILECs propose use restrictions that would prevent CLECs from using UNEs to offer customers alternatives to "high margin" access and

other ILEC services that would provide "arbitrage" opportunities. Finally, the ILECs urge that the Commission eliminate any obligation that they provide access to the high frequency portion of loops at TELRIC-based rates, either in all existing facilities or, at a minimum, in "new" facilities.

These claims are not new. They ILECs made then in the 1996 *Local Competition* proceedings and in the 1999 *UNE Remand* proceedings, and the Commission squarely rejected them both times on the basis of detailed findings grounded in basic principles of economics and the then-actual market experience. However, in the past two years, ILECs have reiterated these claims by advancing subsequently developed "data" and purported "market share" statistics, "studies," and "models" – much of which have been set forth in "fact reports" and other documents prepared by their lawyers. The actual market evidence squarely forecloses these claims.

The adoption of any one of the ILECs' proposals would further entrench their monopolies and eliminate the possibilities of facilities based and other competition that benefits the public. Indeed, the adoption of any one would be antithetical to the terms and purposes of the 1996 Act. This is clear from the "actual marketplace experience" that, as the *Notice* states, must govern determinations whether multiple CLECs require access to UNEs profitably to provide service and whether their availability as UNEs subverts any objective of the Act.

There are four fundamental facts established by actual market experience:

(1) UNE-P competition is beneficial in itself and is now providing substantial benefits to millions of customers;

(2) UNE-P does not impede facilities investment, but affirmatively fosters investment by CLECs and ILECs alike;

(3) unbundling obligations have no adverse effect on ILEC broadband investment and promote overall broadband investment and competition in voice and data service; and

(4) there is no generic set of conditions in which CLECs can now economically provide service without using the loop, transport, and switching UNEs, and the ILECs' proposals for "granular" rules would prevent competition, require detailed intrusive regulatory micromanagement, and serve no substantial purpose.

1. UNE-P Competition Is Beneficial In Itself. Even if UNE-P did not lead to loop, transport, or switching investment, actual experience demonstrates that consumers and the national economy derive extraordinary benefits from the rules that allow multiple CLECs to obtain these inputs at TELRIC-based rates and to compete in the retail functions of packaging, pricing, and delivering local services to consumers. *See* Willig Dec. ¶¶ 75-82. Indeed, while high UNE rates continue to make UNE-P competition infeasible in many states, UNE-P is now providing consumers with real competitive benefits that no other form of competition today can match.

For example, in the two years since the New York Public Service Commission first compelled Verizon to comply with the Commission's unbundling rules, AT&T itself has used UNE-P to win about **[proprietary begin] ******* [propriety end]** local residential customers in New York, and thousands more sign up each month. AT&T began using UNE-P to provide residential service in Texas in 2000. AT&T also recently introduced UNE-P service in Georgia, is beginning to offer it in Michigan, and is actively pursuing UNE-P entry in other states where conditions permit. Where UNE-P entry has been viable, it has been embraced by customers. Indeed, CLECs are serving almost as many residential local telephone customers through UNE-P in New York alone than are served by all the nation's cable operators in the country as a whole.

AT&T's UNE-P customers are plainly benefiting from AT&T's unique calling plans, which offer services and feature packages not available from the incumbent. For example, in the

face of Verizon's announced plans to raise local service rates in New York, AT&T has introduced an offer to provide service with no price increases for the next year. Huels Dec. ¶ 54. New York consumers, as well as those in Texas, Michigan, and Georgia, would thus plainly be harmed by any rollback in the availability of UNEs. Broad availability of UNEs is thus "good in itself" and should be maintained for the benefit of consumers.

2. UNE-P Competition Fosters Facilities-Based Competition And Increased Investment By CLECs and ILECs Alike. The ILECs' argument that UNE-P suppresses facility investment rests on the fact that the Commission's TELRIC regulations allow CLECs to lease elements based on their efficient replacements costs and the ILECs' assertion that no CLEC could therefore ever construct facilities at a lower cost. While the Commission has found that this latter assertion is not always true (*see Local Competition Order* ¶ 685), the ILECs' claim is wrong for a far more fundamental reason. It ignores that CLECs also incur additional "transaction" costs and inherently operate at other competitive disadvantages where they use UNEs and that the "real" cost to the CLEC of a UNE is thus much greater than the TELRIC-based rate. Willig Dec. ¶¶ 52-55. For example, in addition to the monitoring and other costs of dealing with the ILEC, a CLEC has "to disclose details about their customers to their chief competitors" and is unable to "ensure the quality of their service and to offer products . . . that differentiate their services" from those of others. *UNE Remand Order* ¶ 112. As the Commission has found, the need to offset these added costs and disadvantages means that CLECs will "deploy alternative facilities as soon as it is technically and economically possible to do so at a cost that is close to the incumbent's LECs' prices for [UNEs]" and profitably to provide service through them. *Id.*

Further, the Commission found in the *UNE Remand Order* that, rather than suppress investments, the availability of UNEs at TELRIC rates serves to "*promote* the development of facilities-based competition" and is a "necessary precondition" to it. *UNE Remand Order* ¶¶ 5, 7, 127 (emphasis added). In particular, because of the economies of scale that characterize telecommunications facilities, a new entrant must have substantial traffic volumes and revenues if it is ever "to recover [the] substantial costs associated with deploying its own facilities" and if it is to achieve unit costs that are close to the ILECs' costs. *Id.* ¶ 80. UNEs allow the customer to develop the necessary customer base and obtain the "necessary market information" before building. *Id.* ¶ 112.

Actual marketplace experience overwhelmingly confirms the Commission's findings – so much so that it is quite absurd that ILECs persist in their claims that UNE-P suppresses facility investment. If such claims had been advanced, and accepted, during the decades in which long-distance competition was developing, there would no competitive long-distance market today. Like CLECs today, MCI and Sprint entered the long-distance market initially through use of the incumbent's facilities, and migrated as quickly as was feasible to providing service through their own facilities once they had acquired sufficient customers to justify such investments. New entrants then, just like new entrants today, were not remotely able to short-circuit that process and make substantial facilities investments "up front." Had they tried to do so, their businesses would have failed.

That is the clear lesson from the recent carnage in the CLEC industry. The simple fact is that, rather than failing to make economic investments because of the availability of UNE-P, CLECs have made far greater investments in facilities than were warranted under the regulatory and market conditions that in fact prevailed. The point is vividly made by the experience of the

scores of now-bankrupt CLECs and of the remaining CLECs who are uniformly experiencing severe financial difficulties. While AT&T was more conservative than these CLECs, its own experience, too, stands as a complete refutation of the ILECs' claim.

For example, rather than rely exclusively on UNE-P, AT&T initially used UNE-P only for residential customers, and the high UNE rates and the resulting low or nonexistent margins meant that AT&T could initially offer UNE-P-based service only in New York and Texas, and has, to date, subsequently introduced it in just two other states (Georgia and Michigan). But because of the limits of UNE-P, AT&T did not rely on it exclusively even to serve residential and mass market customers. AT&T invested over **[proprietary copying prohibited begin]** ** ******* **[proprietary copying prohibited end]** in an attempt to use fixed wireless to provide residential services – which was unsuccessful both for AT&T and for other now-bankrupt carriers. AT&T also invested tens of billions of dollars in providing local service over cable television systems – which is promising, but which is now being pursued in only some locales and which, even where successful, can only increase the number of carriers from one to two. *See UNE Remand Order* ¶ 55. Finally, AT&T has invested in facilities that will eventually allow it to provide residential customers with not just DSL-based data services, but also second or third voice lines over their existing loops.

In the case of all business customers – who typically generate more revenue than residential customers – AT&T made no use of UNE-P initially. Rather, it planned to serve business customers exclusively through UNE-L or similar arrangements involving self-provisioned switching and, in some cases, fiber rings that link AT&T switches. AT&T has invested additional billions of dollars in local switching and transmission facilities since 1996,

and has deployed over 115 Class 5 circuit switches and over 17,000 fiber route miles. *See* Lesher-Frontera Dec. ¶¶ 9, 32, 38.

While AT&T's business planning was relatively conservative, these investments were fundamentally made on speculation that AT&T would be able to attract sufficient traffic and revenues to make the investments economic. However, these same facilities are now severely underutilized, due both to ILEC practices and the consequences of regulatory rules the Commission imposed at the ILECs' behest. For example, the Commission's order ending reciprocal compensation on ISP-bound traffic deprived AT&T of revenues from an arbitrage opportunity that had been a product of the ILECs' success in setting initial TELRIC rates at excessive levels and that, while temporary, had provided AT&T and other CLECs a revenue stream that could have helped support their installed facilities until other traffic and revenue was attracted. *See* Willig Dec. ¶¶ 26, 99.

Similarly, the Commission's use and co-mingling restrictions on loop-transport combinations prevented AT&T from achieving lower costs in obtaining access to long distance customers and also significantly increased its cost of providing local exchange and exchange access service to local customers. Willig Dec. ¶ 148; Lesher-Frontera Dec. ¶¶ 26, 70-72. And the high nonrecurring charges, inefficiencies, capacity constraints, and other service failures associated with hot cuts precluded AT&T from putting sufficient volumes of traffic on its switching and other facilities to achieve minimum efficient scales of operation. Lesher-Frontera Dec. ¶¶ 63-68. In addition to establishing that AT&T has made greater investments than proved warranted, this experience also underscores the inherent fragility of the CLECs' business and the ways in which the economics of a CLEC's operations can be destroyed by the individual or

cumulative effects of actions that the ILECs urged and that seemed benign to the Commission. Willig Dec. ¶¶ 13, 27, 131.

Further, actual market experience has more than definitively disproved the ILECs' claims that UNEs suppress CLEC investment. It also confirms the Commission's findings that the availability of UNEs affirmatively *promotes* CLEC facilities investment. Market experience has shown that the relationship between UNEs and facility use and deployment is quite direct. As noted, AT&T's ability to fill its deployed switches and to justify deploying new ones foundered on the incumbent LECs' inability to provision "hot cuts" in a timely, efficient, economic, and accurate manner. AT&T now uses unbundled switching and UNE-P initially to serve customers with voice-grade lines, and when AT&T obtains a critical mass of customers who can be economically and practically transferred to AT&T's switches on a project basis, AT&T will arrange managed cutovers to its switches.

The availability of UNE-P is also playing an important role in the transition to facilities-based data and voice service for residential customers. AT&T has already begun to offer residential customers in New York a combined package of voice and DSL-based services using a combination of UNE-P and AT&T's own packet-switching and advanced services network. Moreover, AT&T plans to deploy packet switching, voice gateways, and associated facilities that will allow it to offer customers second and third "derived" voice lines through its packet-switched network and the high frequency portion of the unbundled loop. Huels Dec. ¶ 64 & n.18.

Other evidence even more dramatically underscores that UNE-P is a necessary precondition to greater investment in alternative facilities. In particular, it shows that there is a direct and positive correlation between the effectiveness of UNE-P competition and the level of

CLEC – and ILEC – investment in a state. For example, residential UNE-P competition has existed in New York since 1999, but has been unavailable in California because the TELRIC rates have precluded CLECs from earning positive margins and the necessary OSS support has not been implemented. California is a much larger state, but in New York, AT&T has deployed more switches (both in absolute terms, and on a per-line basis), has extended fiber to more buildings, and is serving far more customers through combinations of AT&T's own switches and unbundled loops. Lesher-Frontera Dec. ¶¶ 49-50; *see also* Willig Dec. ¶ 107.

Beyond that, the evidence indicates that *ILECs* well understand that UNEs lead to broader and more effective facilities-based competition from CLECs and that, in anticipation of this facilities-based competition, ILECs have made greater per-line investments in their networks in states where there is, or can be, effective UNE-P competition. The data foreclose the ILECs' claim that they invest less in states that have established the conditions for effective UNE-P competition. Willig Dec. ¶¶ 108-22 & Exhibits 2, 3. In fact, they show that the rate of ILEC investment in facilities is *higher* in the states with the highest levels of UNE-P entry – New York, Texas, and Georgia – than it is in comparable states where UNE-P based competition has yet to emerge, such as California, Massachusetts, or New Jersey. *Id.* ¶¶ 108-10. Beyond that, the data indicate more broadly that the closer the UNE rates in a state are to the proposals that AT&T and WorldCom made based on the Hatfield cost model, the higher the level of per line investment by ILECs. *Id.* ¶¶ 111-22 & Exhibits 2, 3.

3. Efficient Access To UNEs Promotes Broadband Investment. The broad availability of unbundled network elements at TELRIC-based rates has also promoted overall investment in broadband, and has no adverse effect on innovation or investment in the ILECs' loop and transport infrastructure. In this regard, the ILECs' claims that the Commission should eliminate

or modify their obligation to provide unbundled access to existing or "new" loop facilities that can support broadband service are cynical and calculated attempts to use the current interest in broadband deployment to entrench the ILECs' monopoly over voice services and to eliminate competition in the data transmission and information services that customers want to receive over local telephone lines. As noted, AT&T intends to offer second and third voice lines as well as DSL-based services to customers through the packet switching and associated equipment it connects to loops. Further, customers increasingly demand voice and high speed data from a single source, and ILECs would monopolize the provision of local service to these customers if CLECs could not efficiently access the high frequency portion of loops. *See id.* ¶¶ 184-88.

The provision of broadband service requires the attachment of electronic equipment to DSL-capable loops that permit higher bandwidth connections. Unbundling obligations plainly foster maximum investment and deployment in the electronic equipment that is necessary to convert DSL-capable loops into the "broadband pipes" that can be used for high-speed Internet access. *See id.* ¶¶ 153-58. Indeed, although the technology was available a decade earlier, ILECs began making these investments themselves only after cable modem services were introduced and CLECs begin making similar investments and offering high speed transmission services to ISPs and others over the ILECs' loops. *Id.* ¶¶ 173-75. Conversely, when the leading data CLECs went bankrupt or curtailed their operations last year, ILECs responded by raising their DSL prices by 25%. *Id.* ¶ 177. The ILECs cannot and do not dispute that unbundling promotes maximum use of existing loops to provide broadband services.

Rather, the ILECs claim that the requirement that they provide access to their loops at TELRIC-based rates has deterred them from making investments that allow DSL-based services to be provided on existing loops – which entail installing fiber feeder and NGDLC equipment on

longer loops. Their notion is that TELRIC does not provide a sufficient return on their loop investment and that ILECs will not make these investments unless they can receive the purportedly greater return that would be earned if they were to be the sole provider of broadband services over the upgraded loops. This claim is spurious on its face. Unbundling obligations have no adverse effect on ILECs' upgrades of their loop infrastructure, for three reasons.

First, TELRIC-based rates fully compensate the ILECs for all the risks that they incur in making particular investments. *Id.* ¶¶ 159-66. Indeed, where ILECs upgrade loops so that they guarantee greater bandwidth than required for voice grade service, TELRIC allows higher rates to be charged CLECs that offer DSL-based services. *Id.*

Second, as SBC correctly stated when it announced its $6 billion Project Pronto, those loop upgrade investments were justified entirely by the cost savings and efficiencies that would be achieved in the provision of "narrowband" voice services and thus in no way depended on the prospect of a supracompetitive return on the loop capabilities used to provide DSL-based services. It is revealing that SBC would threaten to withhold investments that are long overdue and needed to provide voice service at a lower cost in attempts to "blackmail" state regulators to end unbundling obligations that would allow competition with SBC's voice and high speed data services alike.

Third, the ILECs' voice monopolies mean that they have powerful disincentives to make investments that will maximize use of broadband, and the ILECs' broadband loop infrastructure investments have been made for other reasons that are quite plainly unaffected by their unbundling obligations. *Id.* ¶¶ 167-79. In particular, ILECs are entrenched monopolists with substantial high-margin second telephone line and other services that are cannibalized by broadband, and ILECs thus did not roll out DSL (or ISDN) technology until cable modem and

CLEC services began to cut into their second line revenues. *Id.* ¶¶ 173-75. The Commission found that it was "the development of competition, and the threat of losing revenue and customers to carriers offering advanced services," that caused incumbent LECs to invest in facilities for advanced services. *UNE Remand Order* ¶ 138. If that threat is diminished, ILECs will invest less, not more.

The actual market experience has confirmed all these points. In the *UNE Remand Order*, the Commission found that even though the incumbent LECs were "on notice that they could be required to unbundle facilities used to provide advanced services," they had nonetheless "announced aggressive rollout plans" for advanced services and were already offering those services "in 7 of the 10 largest MSAs and in 22 of the top 50 MSAs." *Id.* ¶ 138. The intervening market experience confirms this fact, for despite the existence of unbundling obligations, the ILECs adopted and have now virtually completed aggressive programs to make loop infrastructure investments that would allow DSL-based service to be offered broadly. Willig Dec. ¶¶ 180-82.

It is also quite clear that requiring ILECs to provide access to NGDLC loops in their central offices – rather than at remote terminals – will have no adverse effect on their upgrades of loops and will, if anything, reduce the costs of investments that are required. For example, SBC's Chief Technology Officer has complained that SBC invested $35 million to $50 million to make space for CLECs in remote terminals that no CLEC is using.[1] Central office access to fully functional loops eliminates the need for such wasteful ILEC investments.

[1] *See SBC's Top Techie on Broadband Blues*, Business Week Online (March 13, 2002) (available at http://www.businessweek.com/bwdaily/list/news04.htm).

Finally, the ILECs' arguments ignore the Commerce Department's recent conclusion that the most pressing broadband issue today is *demand*, not supply. Given this market fact, if the ILECs' concern were maximum broadband deployment – rather than limiting competition – they would welcome the CLEC investments that stimulate demand for, and usage of, their loop infrastructure investments.

4. CLECs Continue To Be Impaired Without Access To Loop, Transport, And Switching UNEs; Existing Restrictions Should Be Eliminated, And Proposed More "Granular" Rules Rejected. Market experience also confirms that CLECs will continue to be impaired in offering service if they cannot obtain access to loops, transport, and switching UNEs and that the ILECs' contrary assertions are baseless. In particular, the experience also confirms that there is no generic set of conditions from which the Commission can "deduce" that alternatives to ILEC facilities can be economically deployed and used and that the ILECs' proposals for more "granular" rules are profoundly anticompetitive.

Loops. The ILECs have acknowledged that voice grade loops that are used to serve residential and most business customers should continue to be made available as UNEs. However, they have advocated eliminating high capacity fiber loops from the unbundling obligation on the ground that some CLECs have been able to self-deploy these facilities to large businesses in *some* circumstances in some dense urban areas. But that is not remotely sufficient to establish that CLECs can generally deploy these loops. Indeed, the experience demonstrates that there are only rare and exceptional circumstances in which CLECs can install high capacity loops because of the economies of scale that characterize these facilities and the rights of way, building access, and other first mover advantages that ILECs enjoy because of their monopolies.

In particular, there are multiple factors that can make it economic to construct a loop to serve one large business customer, but completely uneconomic to construct facilities to serve other customers with similar telecommunications needs in that same general area. These include: the customer's proximity to an existing fiber ring, the customer's willingness and ability to make a multi-year commitment that will apply during the substantial period in which loops are constructed, the availability of the necessary rights-of-way, and whether the CLEC has access to the building. Further, even when conditions permit construction of a loop, the ILEC's first mover advantages also mean that it already has existing "sunk" working loops to virtually all customers and that the ILEC can upgrade them or provide any additional facilities required to meet any customer's needs at incremental costs that are a fraction of the CLEC's costs of constructing a loop to the premises. Thus, the Commission's finding in the *UNE Remand Order* remains as valid today as in 1999:

> that some competitive LECs, in certain instances, have found it economical to serve certain customers using their own loops suggests to us only that carriers are unimpaired in their ability to serve those particular customers. This evidence tells us nothing about the customer the competitor would like to serve but cannot . . . .

UNE Remand Order ¶ 184.

Moreover, even when a new customer makes a commitment to use a self-provisioned loop, it requires substantial time to be built (when no revenues are earned), and the CLEC is impaired in the interim without access to unbundled loops. *Id.* ¶¶ 89-95.

Thus, the market experience confirms that there should be no exception to the availability of unbundled loops, regardless of capacity. There is no generic set of conditions in which CLECs who do not have access to high capacity UNE loops can economically provide service to the customers who require such loops. And any attempt to create an exception on any other basis

would allow ILECs to engage in case-by-case litigation that would anticompetitively raise the CLECs' costs.

Transport. Real-world market experience also confirms the continued validity of the *UNE Remand Order's* finding that CLECs are impaired without access to dedicated transport, which provides "point to point connections" between CLEC locations and between these locations and the various LEC offices from which a CLEC seeks to serve customers. It continues to be the case today that alternatives to ILEC transport facilities are available only on a fraction of these routes.

This is starkly confirmed by the Commission's recent determination that competitors now provide only about 12% of special access services, which are predominantly offered on the point-to-point routes with the greatest concentrations of traffic. In this regard, the Commission's recent finding underscores a point that AT&T has consistently made over the past several years: the 35% figure that the ILECs purported to derive from nonpublic data and that has been asserted *ad nauseum* to represent the CLECs' "market share" is a fabrication. This highlights the importance of the Commission's determination in the *Notice* that its unbundling determinations be made on the basis of actual market experience and not yet more models, studies or so-called "fact reports" created by the ILECs' lawyers.

Finally, market experience demonstrates that there is no way for the Commission to deduce and specify *ex ante* which are the exact point-to-point routes where CLECs can self-deploy transport or obtain it from sources other than the ILEC. Even if it were possible to specify the capacity levels and other characteristics that might allow alternative transport facilities to be economic on individual routes, rights of way and other issues may preclude a CLEC from deploying transport, and doing so will take several years time even after rights of

ways are secured. Further, even then, CLEC may not be able to obtain the necessary collocation arrangements because of lack of space at the central office, excessive up-front or recurring collocation charges, or because the ILEC has imposed other discriminatory terms and conditions on collocation. *See* Fea-Taggart Use Restriction Dec. ¶ 14.

Switching. The actual marketplace experience since the *UNE Remand Order* also establishes that CLECs are impaired in using self-provisioned switching in a broader set of conditions than the Commission had believed. Fostering facilities-based service requires that the Commission eliminate the three existing restrictions on the use of UNEs and adopt measures to incent the ILECs to deploy electronic loop provisioning.

The fundamental economics of self-provisioned switching is unchanged. Switching continues to be characterized by fixed costs that preclude a CLEC from providing its own switching at unit costs close to the ILEC's unless the CLEC achieves a significant customer base. *UNE Remand Order* ¶¶ 260. Moreover, the deployment of switches continues to requires 6 to 12 months. *Id.* ¶ 268. Further, even when centrally located switches have been *deployed* and a CLEC targets a sufficient customer base in the area, the CLEC is impaired in *using* the switch if customers cannot be timely and accurately connected to its facilities due to the limitations of hot cuts or the special technical and economic obstacles presented by the large (25%) and rapidly growing percentage of loops now served through DLC. *Id.* ¶ 271. Finally, even if timely connections can be made, CLECs cannot economically serve a class of customers through its switch if they do not generate sufficient revenues to cover the added costs that CLECs inherently incur when they use centrally located switches: *i.e.*, the recurring and nonrecurring costs of the central office connections to the loop (including any necessary collocations) and the "distance

sensitive transport" and "backhaul" costs of taking traffic between the ILEC central office and the CLEC switch. *Id.* ¶¶ 261-66.

Here, the actual market experience establishes that unbundled switching must remain generally available at least until such time as electronic loop provisioning is implemented – with the possible exception of customers with DS1 or higher capacity loops that can be served through EELs.

Indeed, the market experience with hot cuts itself establishes that CLECs are today impaired in serving customers unless they use unbundled switching (and UNE-P) at least initially to serve customers. The *Notice* appears to acknowledge this fact, and notes AT&T's plans to move certain large groups of customers from UNE-P to its own switches on a project basis, and asks whether the Commission should impose a limit on the length of time that any individual customer can be served through unbundled switching. It should not. There is now only limited experience with moving groups of customers on a project basis, and while project moves eliminate one absolute impediment to using switches to serve some customers, other impediments remain. A range of factors will determine whether it is economic to move particular customers to a CLECs' switch on a project basis: the level of charges that ILECs are permitted to impose for effecting those moves; the quantity of customers that are served in any individual LEC office; the distance from that office to switches that have been or may be deployed; the existence of alternative switches; and the revenues that the particular class of customers generates. In addition, for customers served by DLC loops, the costs and feasibility of arrangements to move DLC loops are also extremely important. Indeed, even with the universal availability of new combinations of loops and high capacity transport, moving residential and

other lower volume customer locations to CLEC switches on a project basis will generally be uneconomic because of these other factors.

And the reality is that the relevant economic and technical factors are far too unpredictable, complicated, and multifaceted to allow the Commission to adopt a "granular" rule that would define the length of time that any class of business customers may be served through UNE-P. And to do so would impose immense costs and ultimately serve no substantial purpose. Such a rule would mean that the Commission and the States would be engaged in detailed, costly, and highly intrusive regulation in attempts to micromanage the conditions under which customers can and cannot be served through the unbundled switching that is concededly necessary for some period of time. That, in turn, would give the ILECs a weapon to harass CLECs and their customers and to raise their costs anticompetitively by litigating – on case by case bases – whether particular customers had been served for "too long" through unbundled switching. Nor is there any legitimate reason for such an exercise. As the market experience demonstrates, CLECs have strong incentives to place customers on alternative switches, and they will do as soon as it is technically and economically feasible.

Accordingly, unrestricted access to unbundled switching must be available at least until such time as an ILEC has implemented electronic loop provisioning methods that eliminate the need for hot cuts and the problems posed by DLC loops and that allow fast, cheap, and reliable transfers of customers to CLEC switches – comparable to those that ILECs make today when customers switch long distance carriers. Where loop-transport combinations are universally available and electronic loop provisioning has been implemented, the only added costs that CLECs will incur in using switches are the distance sensitive transport costs of backhaul facilities. If these cost disadvantages could be managed, electronic loop provisioning could lead

to the development of a competitive wholesale switching market that may create sufficient capacity to meet the needs of multiple CLECs and discipline ILECs, and in turn could create a path toward removing local switching as an unbundled network element at TELRIC rates.

In this regard, the critical value of promoting the deployment of electronic loop provisioning is highlighted when viewed in light of the actual market and regulatory experience that created a competitive long distance market. Although the Commission first opened the door to long distance competition in 1968, it was not until after the BOCs implemented equal access to their local exchange facilities and this Commission ordered the removal of restrictions on long distance resale that competitors were finally able to acquire sufficient access to customers and volumes of traffic to support the development of parallel networks. Deployment of electronic loop provisioning can help to support the same evolution for local competition, and the Commission should act now to provide ILECs with incentives to give all competitors seamless electronic access to the full spectrum on customer loops.

Finally, the ILECs have also proposed another "granular" restriction that is purportedly designed to foster broadband investment by placing all "new" investments in broadband on the same footing. In particular, while preserving the ILECs' duty to provide access to high frequency portions of existing loops, the proposed new restriction would eliminate the ILECs' unbundling obligation for some or all "new" loops. Such a rule is wholly unworkable and would demonstrably foreclose competition in broadband and voice services alike. Any notion that CLECs and ILECs have remotely equal ability to make new loop investments is flatly wrong. When ILECs make broadband infrastructure investments, they are an integral part of their existing ubiquitous networks, not separate new undertakings. The new investments are a replacement of part of, or an overlay on top of, their existing networks, and the ILECs have the

same economies of scale and first mover advantages in deploying these facilities as they do in the rest of their networks. CLECs cannot economically replicate such "new" facilities, and the consequence of the proposed rule would be further to entrench the ILECs' monopolies by preventing CLECs from offering services over these upgraded loops. That would prevent competition not just in broadband, but in packages of voice and data services as well.

In sum, there is no basis for the Commission to adopt more "granular" national rules that would define the conditions under which the loop, transport, and switching UNEs could be made unavailable. Facile claims that alternatives to UNEs are available simply ignore the multiple and interrelated factors that affect whether particular customers can be economically served through alternative facilities and the severe impediments to competition that the current limits on access to UNEs have created. The Commission should be all the more skeptical of such proposals because of their enormous potential to defeat, rather than promote, facilities-based competition. As explained above, the three "granular" restrictions that the Commission has placed on the availability of UNEs have already prevented CLECs from building the customer volumes and revenue streams they need to support their previously deployed facilities. The practical difficulties of complying with complex and unworkable "safe harbors" for use restrictions, the stark inefficiencies resulting from a prohibition on co-mingling, and the inevitable litigation and gamesmanship over where the lines have been drawn have kept courtrooms full but circuits empty. They have also prolonged the underutilization of existing CLEC facilities and made it even harder to justify the deployment of additional facilities. The Commission should thus remove its current restrictions on UNE-availability, not expand them.

At best, restricting the availability of unbundled network elements will doom the efforts of non-cable competitors, leaving consumers with only the competition between the incumbent

LEC and a cable provider that Congress rejected and that the Commission has already held to be insufficient under the Act. *UNE Remand Order* ¶ 55. At worst, it would lead to the very remonopolization of local and long distance telephone service by the incumbent that the Act was designed to prevent.

The remainder of these comments, and supporting declarations, are voluminous, for several reasons. First, the *Notice* encompasses a wide range of issues, many of which are of extraordinary importance to the future of local competition. Second, some of these key issues (use restrictions; access to NGDLC) were separately and fully briefed months ago; while AT&T has not repeated all of that prior briefing, we have tried to highlight the most important points, in the hope that this will expedite a decision. Third, AT&T is providing the Commission with the extensive evidence of real-world market experience that the Commission requested.

Part I addresses the Commission's questions regarding the "impair" standard and demonstrates that the Commission's governing standard is faithful to the Act and to the Supreme Court's decision in *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). In addition, it explains why, of the various factors that the Commission should consider in evaluating impairment, "cost" must continue to be given pre-eminent, and often dispositive, weight.

Part II addresses the impact of the availability of unbundled network elements on the development of local competition and on investment in facilities. It begins by noting that the Commission's legal authority to justify denial of access to UNEs when the impair standard is met in order to promote investment in facilities is questionable. But the principal focus of Part II challenges the factual premise that would underlie any such step. It demonstrates that the ready availability of unbundled network elements promotes facilities-based investment by both competitive and incumbent LECs, a fact that this is borne out by AT&T's market experience and

by available empirical evidence. It also refutes the incumbents' contention that unbundling obligations reduce CLECs' incentives to invest, particularly in broadband facilities. And it confirms, again through market experience, the pro-competitive role that UNEs already have played in bringing new service plans and lower prices to residential and business customers.

Part III addresses the various suggestions for more "granular" restrictions on the availability of UNEs. It shows that these suggestions misapprehend the nature and severity of the impairments that UNEs help overcome, and that they also underestimate the counter-productive practical impact inherent in detailed regulatory line-drawing.

Part IV addresses the continuing need for unbundled access to each of the individual network elements on the national list. Subpart A explains why competitors continue to be impaired in offering local service without access to the "transmission" elements, unbundled loops and transport. Not only do competitors rarely have the traffic volume needed to justify an investment in their own facilities, but obstacles relating to collocation, building access, and rights of way also continue to raise the costs of self-provisioning, while alternatives to the incumbents' network facilities remain inadequate. This section also addresses the continued impairments caused by the Commission's longstanding "interim" use and co-mingling restrictions for enhanced extended loops.

Subpart B addresses NGDLC (or "unified") loops. It explains why it is crucial to future competition – for both voice and data services – that the Commission require the incumbents to unbundle their upgraded loop facilities. The unrebutted evidence that has been before the Commission for well over a year clearly shows that competitors lack the incumbents' existing customer base and facilities and cannot economically replicate those upgrades. Indeed, the CLECs' impairment relating to these loops is substantially greater than the impairment related to